

INDEX

	Page
Opinion Below.....	1
Jurisdiction.....	1
Question Presented.....	2
Statement.....	2
Argument.....	6
Conclusion.....	8

CITATIONS

Cases:

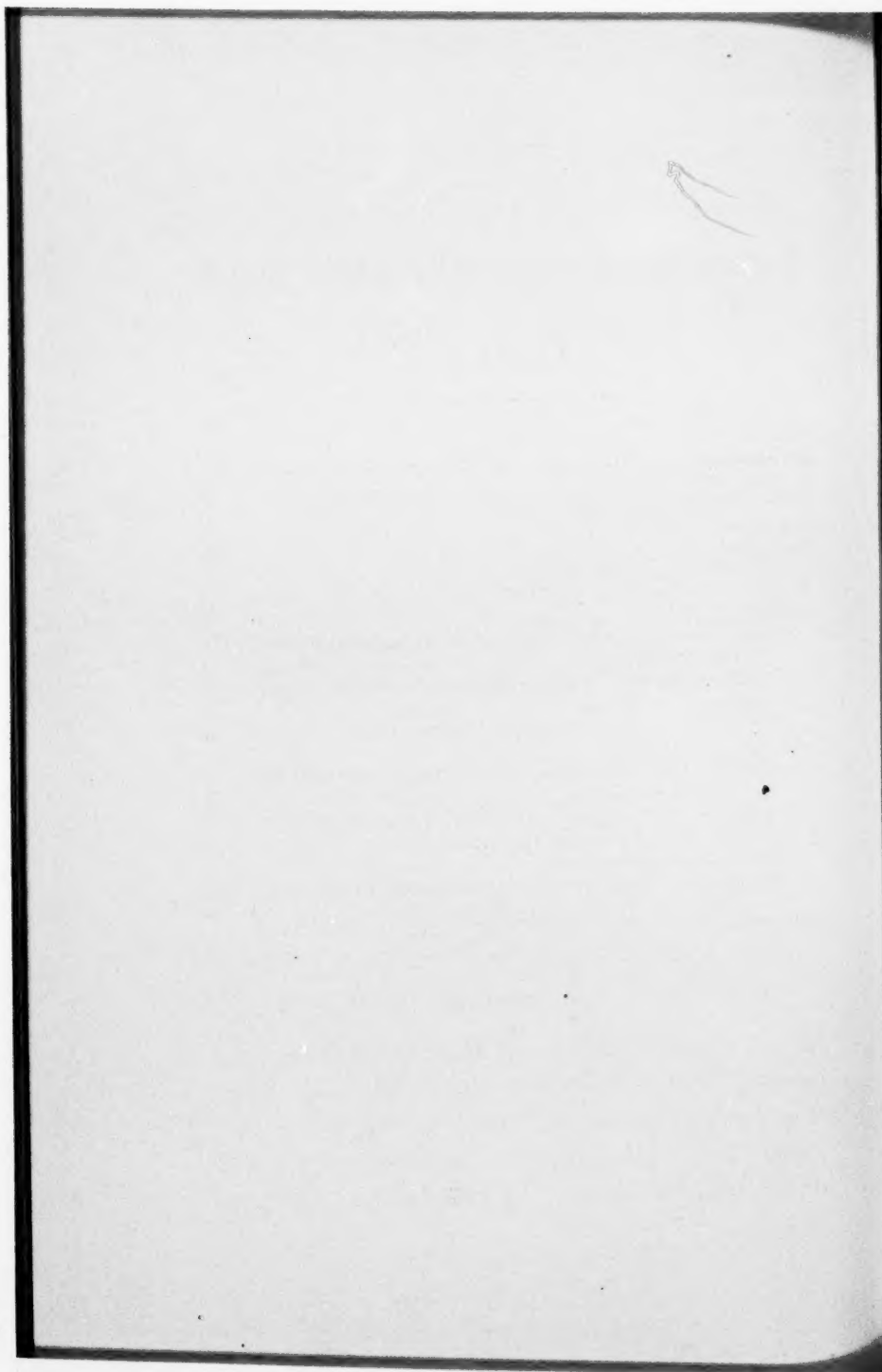
<i>Cummings v. Deutsche Bank und Discontogesellschaft</i> , 300 U. S. 115, 120, 121.....	6
<i>Sielcken-Schwarz v. American Factors, Limited</i> , 60 F. (2d) 43 (C. C. A. 2).....	7
<i>Stern v. Newton</i> , 39 N. Y. Supp. (2d) 593 (1943).....	6

Statutes:

Act of July 2, 1940 (c. 508, 54 Stat. 714, U. S. C. Title 50, * Appendix, Section 701).....	2
First War Powers Act of 1941 (c. 593, 55 Stat. 838, U. S. C. Title 50, Appendix).....	3
Judicial Code, Section 240 (a).....	1
Trading with the Enemy Act of October 6, 1917 (c. 106, 40 Stat. 411, U. S. C., Title 50, Appendix).....	3

Miscellaneous:

Rules of Criminal Procedure After Plea of Guilty, Verdict or Finding of Guilt, Rule XI.....	2
Vesting Order No. 373 (7 Federal Register 10890).....	3



In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1029

FERDINAND A. KERTESS AND CHEMICAL MARKETING
COMPANY, INCORPORATED, PETITIONERS

v.

THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Circuit Court of Appeals entered, without opinion, the order which the petitioners seek to have reviewed.

JURISDICTION

The order of the Circuit Court of Appeals was entered on April 13, 1943 (R. 18-20). The petition for a writ of certiorari was filed May 17, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as

amended by the Act of February 13, 1925. See also Rule XI of the Rules of Criminal Procedure After Plea of Guilty, Verdict or Finding of Guilt, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The Alien Property Custodian vested all the shares of capital stock of a corporation and elected new directors who chose new officers. The question is whether the officers elected by the new directors may enter pleas of *nolo contendere* on behalf of the corporation with respect to indictments returned against it prior to the effective date of the vesting order of the Alien Property Custodian.

STATEMENT

The petitioner, Ferdinand A. Kertess, who is a naturalized citizen of the United States, retained his present counsel, Joseph H. Broderick, Esq., to defend him and his wholly owned corporation, Chemical Marketing Company, Incorporated, against four indictments charging unlawful exportation of and conspiracy to export certain metals of the platinum group in violation of the Proclamation of the President promulgated under the authority of the Act of July 2, 1940. (c. 508, 54 Stat. 714, U. S. C., Title 50, Appendix, Section 701.) On November 6, 1942, counsel entered pleas of not guilty for the individual petitioner and for the corporation.

On November 18, 1942, Leo T. Crowley, Alien Property Custodian, acting under the authority of the Trading with the Enemy Act of October 6, 1917 (c. 106, 40 Stat. 411, U. S. C., Title 50, Appendix, Section 5 (b)), as amended by the First War Powers Act of 1941 (c. 593, 55 Stat. 838, U. S. C. Title 50, Appendix), issued his Vesting Order No. 373, published on December 25, 1942, in 7 Federal Register 10890 (R. 2-3 and 12-13). In this Vesting Order the Custodian, after investigation, found that the petitioner, Ferdinand A. Kertess, was controlled by, or acting on behalf of, or as a cloak for, a designated enemy country, namely, Germany, or a person within such country, and determined, therefore, that petitioner was a national of that designated enemy country. The Custodian further found that the petitioner was the owner of all of the outstanding shares of stock of Chemical Marketing Company, Incorporated, and therefore determined that the business enterprise was a national of a designated enemy country, and proceeded to vest all of the outstanding shares of capital stock of the corporation "to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States." On December 16, 1942, the Custodian, in his capacity as stockholder, caused a stockholders' meeting of the corporation to be held. At that meeting new directors were elected (R. 10-11), and on the same day the directors

met and elected Joseph A. Reilly president of the corporation (R. 11).

On January 15, 1943, Joseph A. Reilly, as president, advised Joseph H. Broderick, Esq., that his employment as attorney for Chemical Marketing Company, Incorporated, was terminated (R. 11).

On February 17, 1943, Joseph A. Reilly, as president of Chemical Marketing Company, Incorporated, applied to the United States District Court for the Southern District of New York for leave to enter pleas of *nolo contendere* on behalf of the corporation. In this application Mr. Reilly stated that, because of facts found by the Custodian and embodied in his vesting order, and because of additional facts learned by the Custodian and the present officers of the corporation from an examination of its files, it was the belief of the Custodian and of the present officers of the corporation that it had no defense to the indictment. The application then recited that the suggestion had been made that the entry of pleas of guilty on behalf of the corporation might prejudice the individual co-defendant Ferdinand A. Kertess, and in order to avoid any possibility of such prejudice, the corporation prayed the Court to accept its pleas of *nolo contendere*. (R. 1-4.)

The petitioner was notified that the application would be made and his counsel appeared and argued in opposition to it (R. 15).

The application was granted and the petitioner appealed "individually and as sole owner of all of the outstanding shares of stock of Chemical Marketing Company, Incorporated." In the notice of appeals Chemical Marketing Company, Incorporated, itself was designated as one of the appellants (R. 4).

The corporation moved to dismiss the appeals; its motion was supported by an affidavit subscribed by Leo T. Crowley, Alien Property Custodian. This affidavit sets forth the vesting of the stock and the subsequent actions taken by him as stockholder and by the new directors and officers of the corporation in their representative capacities. (R. 9-11.) A counter-affidavit was filed by the individual petitioner (R. 13-16). After argument the Circuit Court of Appeals granted the motion, "it appearing to the satisfaction of the Court that said defendant-appellant Ferdinand A. Kertess had, and has, no standing to take said appeals individually, and that the defendant Chemical Marketing Company, Incorporated, has not authorized the taking of said appeals, and that the defendant-appellant Ferdinand A. Kertess had, and has, no standing to take said appeals as the alleged sole owner of all of the outstanding shares of stock of the defendant Chemical Marketing Company, Incorporated, or on behalf of said corporation, in that he is not a stockholder, director, or officer of said corporation, all of whose shares of capital stock have been

vested by Leo T. Crowley, Alien Property Custodian of the United States" (R. 18-20). The present petitioner seeks to have this Court review the order of the Circuit Court of Appeals granting the motion to dismiss.

ARGUMENT

The petitioner does not challenge the constitutionality of the Trading with the Enemy Act, as amended, or the validity of the Executive orders issued thereunder. His attack is upon the scope of the powers of the Custodian. He asserts that the Custodian's present powers are those of a trustee and conservator for the enemy. But there is no support for this contention, either in the provisions of the original Trading with the Enemy Act or in the provisions of the Act as amended by the First War Powers Act of 1941. The effect of a seizure of property under the original Act was to divest the former enemy owner of every right with respect to such property and to vest "absolute" title in the United States. *Cummings v. Deutsche Bank und Discontogesellschaft*, 300 U. S. 115, 120, 121. That this is equally true under the provisions of Section 5 (b) of the original Act, as amended by the First War Powers Act of 1941, is indicated by the opinion in *Stern v. Newton*, 39 N. Y. Supp. (2d) 593 (Sup. Ct., N. Y. Co., decided February 5, 1943) and in the cases cited by the petitioners on page 5 of their petition.

The action complained of was taken by the Custodian in the exercise of the ordinary powers of a stockholder. The Custodian, having vested the controlling shares of capital stock of a corporation, may exercise all of the rights of a stockholder, even to the extent of assenting to the sale of all assets of the corporation. *Sielcken-Schwarz v. American Factors, Limited*, 60 F. (2d) 43 (C. C. A. 2). As the controlling stockholder, the Custodian is not free to expend funds beneficially owned by the United States in defense of a criminal proceeding if he believes that the corporate defendant has no defense.

The petitioner asserts that the Custodian cannot "dominate" criminal proceedings to which a corporation was made a party prior to the vesting of its shares of capital stock. The full effect of the Custodian's undoubted constitutional powers to make "captures on land and water" is not to be deemed curtailed because the corporation whose shares of stock have been vested is already a defendant in criminal proceedings. The Custodian, of course, does not seek to "dominate" the criminal proceedings against the petitioner Kertess. He is free to defend that action as he and his counsel may see fit. The Custodian seeks merely to exercise a stockholder's right, which Kertess would never have denied to himself while a stockholder.

The petitioner, Kertess, as the former owner of vested property, has the right to challenge the propriety of the vesting order of the Custodian, but this challenge cannot be made in this proceeding.

CONCLUSION

The decision below is correct. The petition raises no questions of substance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

ROBERT L. STERN,
Attorney.

JUNE 1943.

